Natsafe (M) Sdn Bhd v Loi Teak Kuong

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S6–24–2345 OF 2003
ABDUL MALIK ISHAK J
21 FEBRUARY 2005

Land Law — Restraint on dealings — Caveats — Private caveat — Removal — Whether shareholder had caveatable interest in property of company — Delay in commencing action to enforce right over property

The defendant was one of the shareholders in the plaintiff. There was a dispute amongst plaintiff's shareholders. Subsequent thereto, the shareholders entered into a settlement agreement, which terms, among others were: (i) two shareholders namely, Loi Tek Huat and Loi Teak Ping were to purchase the shares of Wong Min Ngik and the defendant in the plaintiff; (ii) the purchase price to be settled, firstly, by way of distribution of the plaintiff's assets and secondly by way of cash. The plaintiff was in financial difficulties. In order to repay its debts, the plaintiff resolved to sell its property to another. The defendant entered a private caveat on the said property. The plaintiff applied to the court for the removal of the said caveat. The defendant claimed that he had a caveatable interest in the property on the grounds that: (i) he was the shareholder of the plaintiff; and (ii) the settlement agreement conferred him rights in the property.

Held, allowing the application:

(1) The defendant did not have a caveatable interest within the meaning of s 323(1) of the National Land Code 1965. Form 19B as filed by the defendant did not vest in him, as a shareholder, any caveatable interest in the property (see para 22).

(2) The plaintiff was not a party to the settlement agreement. The parties involved in the settlement agreement were the shareholders of the plaintiff. That being the case, the defendant could not enforce the settlement agreement against the plaintiff. It was for this very reason that the settlement agreement did not confer any caveatable interest to the defendant (see para 24); *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189 followed.

(3) The provisions in the settlement agreement concerning the distribution of the plaintiff's property to satisfy the purchase price of its own shares ('the distribution') was unenforceable in law as: (i) the distribution had the effect of reducing the share capital without leave of the court and hence it was unenforceable by virtue of s 64 of the Companies Act 1965; and (ii) the distribution had the effect of assisting the shareholders to purchase the plaintiff's own shares thus contravened s 67(1) of the Companies Act 1965 (see paras 26, 30 and 32).

(4) The defendant acquired no proprietary interest whatsoever in any property of the plaintiff. It could be surmised that the defendant's right arising from the settlement agreement was merely 'monetary' and it arose from the value of his shares in the plaintiff. Thus, it could not be said that the defendant had a caveatable interest as he was neither claiming any right or interest to such title of the property (see para 34).

(5) The balance of convenience laid in favour of removing the private caveat. Moreover, there had been a delay of almost two years on the part of the defendant to commence proceedings timeously to enforce his legal rights, if any (see paras 39 and 68).

[**Bahasa Malaysia summary**

Defendan adalah salah satu dari pemegang saham plaintif. Terdapat pertelingkahan di antara pemegang-pemegang saham plaintif. Mereka kemudiannya memasuki satu perjanjian penyelesaian, di mana terma-termanya antara lain adalah: (i)dua pemegang saham iaitu, Loi Tek Huat dan Loi Teak Ping akan membeli saham plaintif dari Wong Min Ngik dan defendan; (ii) harga saham akan dilunaskan, pertama secara pengagihan aset-aset plaintif dan kedua secara tunai. Plaintif mengalami masalah kewangan. Untuk membayar hutang-hutangnya, plaintif mengambil keputusan untuk menjual hartanahnya. Defendan memasukkan kaveat persendirian ke atas tanah tersebut. Plaintif memohon kepada mahkamah agar kaveat tersebut dibuang. Defendan mendakwa yang beliau mempunyai kepentingan yang boleh dikaveatkan dalam hartanah tersebut kerana: (i) beliau adalah seorang pemegang saham plaintif; dan (ii) perjanjian penyelesaian memberikan hak-hak kepadanya ke atas hartanah tersebut.

Diputuskan, membenarkan permohonan tersebut:

(1) Defendan tidak mempunyai kepentingan yang boleh dikaveatkan dalam erti kata s 323(1) Kanun Tanah Negara. Borang 19B seperti mana yang diisi oleh defendan tidak meletakhak kepadanya sebagai seorang pemegang saham sebarang kepentingan yang boleh dikaveatkan dalam hartanah tersebut (lihat perenggan 22)

(2) Plaintif bukanlah seorang pihak di dalam perjanjian penyelesaian tersebut. Pihak-pihak yang terlibat di dalam perjanjian penyelesaian tersebut adalah pemegang-pemegang saham plaintif. Oleh yang demikian, defendan tidak dapat menguatkuasakan perjanjian penyelesaian tersebut terhadap plaintif. Inilah sebabnya perjanjian penyelesaian tidak memberi sebarang kepentingan yang boleh dikaveatkan kepada defendan (lihat perenggan 24); *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189 diikut.

(3) Peruntukan-peruntukan di dalam perjanjian penyelesaian berhubung dengan pengagihan hartanah plaintif untuk melunaskan harga belian

sahamnya sendiri ('pengagihan') tidak boleh dikuatkuasakan pada undang-undang kerana: (i) pengagihan tersebut memberi kesan pengurangan modal saham tanpa kebenaran mahkamah dan dari itu ianya tidak boleh dikuatkuasakan kerana s 64 Akta Syarikat 1965; dan (ii) pengagihan tersebut memberi kesan memberi bantuan kepada pemegang saham untuk membeli saham plaintif sendiri dan dari itu bertentangan dengan s 67(1) Akta Syarikat 1965 (lihat perenggan 26, 30 dan 32).

(4) Defendan tidak 'memperolehi' sebarang kepentingan keempunyaan dalam mana-mana hartanah plaintif. Ia boleh dirumuskan bahawa hak defendan yang berbangkit dari perjanjian penyelesaian adalah 'kewangan' semata dan ia berbangkit dari nilai sahamnya dalam plaintif. Oleh yang demikian, ia tidak boleh dikatakan bahawa defendan mempunyai kepentingan yang boleh dikaveatkan kerana beliau tidak menuntut sebarang hak atau kepentingan berhubung hakmilik hartanah tersebut (lihat perenggan 34).

(5) Imbangan kemudahan berpihak kepada pembuangan kaveat persendirian tersebut. Lagipun, terdapat kelewatan selama lebih kurang dua tahun pada pihak defendan untuk memulakan prosiding untuk menguatkuasakan haknya di sisi undang-undang, jika ada (lihat perenggan 39 dan 68).]

Notes

For cases on caveats, see 8(2) Mallal's Digest (4th Ed, 2003 Reissue) paras3192–3498.

Cases referred to

Andamy Plantations Sdn Bhd v Tunis Saladou & Ors [2002] 6 CLJ 201 (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)
Balakong Development Sdn Bhd v Loo Kok Yuen & Anor [1999] 2 MLJ 646 (refd)
Bee Ya Hock @ Beh Ah Hock v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors [1994] MLJU 85 (refd)
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212 (refd)
Hew Sook Ying v Hiw Tin Hee [1992] 2 MLJ 189 (folld)
Independent Steels Pty Ltd v Ryan & Anor [1990] VR 247 (refd)
Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761 (refd)
Kumpulan Sua Belong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263 (refd)
Kundang Lakes Country Club Bhd v Garden Masters (M) Sdn Bhd [1999] 2 MLJ 537 (refd)
Lee Eng Eow v Mary Lee & Ors [1999] MLJU 301 (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)
Merchant Credit Pte Ltd v Industrial & Commercial Realty Co Ltd [1983] 1 MLJ 124 (refd)
Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors [1981] 2 MLJ 114 (refd)
Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

NP Sinnasamy v Hup Aik Omnibus Co [1952] MLJ 36 (refd)
Priyamas Export Corp Sdn Bhd v Bank Buruh (Malaysia) Bhd [1998] 3 MLJ 273 (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151 (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1996] 3 MLJ 692 (refd)
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff Shah Mohd & Ors & other appeals [1996] 2 MLJ 265 (refd)
Trans-Summit Sdn Bhd v Chun Nyook Lin (P) [1996] 2 MLJ 247 (refd)
Trevor & Anor v Whitworth & Ors [1886–90] All ER 46 (refd)
Tweddle v Atkinson (1861) 1 B&S 393 (refd)
Yango Pastoral Company Pty Ltd & Ors v First Chicago Australia Ltd & Ors [1978] 139 CLR 410 (refd)

Legislation referred to

Companies Act 1961 [Vict] s 67(1)
Companies Act 1965 ss 64, 67(1)
Contracts Act 1950 s 24
National Land Code 1965 ss 323(1), 327(1)

Yap Boon Hau (Lee Hishammuddin Allen & Gledhill) for the plaintiff.
Ling Hua Keong (Isa Ling & Mok) for the defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] By way of prayer (a) of encl 1, the plaintiff seeks to remove the private caveat entered by the defendant on 17 March 2003 on the property held under HS(D) 48466, No Lot 47973, Mukim Kuala Lumpur wherein one unit of a double storey link house stands bearing an address at Lot 25, Jalan 39/70A, Desa Sri Hartamas 50480 Kuala Lumpur measuring 153.285 square meters in area (hereinafter referred to as the 'property'). The plaintiff also seeks by way of prayer (b) of encl 1 to prevent the defendant by himself or through his servant or agent from lodging any private caveat on the said property for the same reason and the plaintiff also seeks by way of prayer (c) of encl one (1) damages and such damages to be assessed by the senior assistant registrar and payable to the plaintiff together with costs as seen at prayer (d) of encl 1 and any other order which the court deems fit and proper as reflected at prayer (e) of encl 1.

FACTS OF THE CASE

[2] The plaintiff is the registered proprietor of the property. The shareholders of the plaintiff do not see eye to eye. Dispute has arisen from among the shareholders of the plaintiff. Four out of the five shareholders entered into an agreement which was recorded as the settlement agreement. The agreement styled as the settlement agreement was dated 13 December 2001 and it can be seen in exh 'A–4' of encl 2.

[3] Now, the principal terms of the settlement agreement are for Loi Tek Huat and Loi Teak Ping to purchase the shares of Wong Min Ngik and the defendant in the plaintiff (hereinafter referred to as the 'share sale'). The purchase price for the shares would be determined by the valuation exercise by the accountant named in the settlement agreement.

[4] I will now refer to the relevant clauses in the settlement agreement. Clause 3.1 of the settlement agreement states as follows:

> In consideration of the premises herein contained, the parties hereto hereby agree to fully and finally settle the disputes in the petition, the civil suit and the counterclaim as follows:
>
> 3.1.1. Loi Tek Huat and Loi Teak Ping hereby agree to purchase and Loi Teak Kuong and Wong Min Ngik hereby agree to sell their entire shareholding and beneficial interests in the companies at the share sale price to be determined pursuant to the terms and conditions as agreed between the parties subject to cl 5.3.
>
> 3.1.2. Loi Tek Huat and Loi Teak Ping hereby agree to purchase and Loi Teak Kuong and Wong Min Ngik hereby agree to sell their entire equity and beneficial interests in Central Electric Co at the equity sale price to be determined pursuant to the terms and conditions as agreed between the parties subject to cl 5.3.

[5] Clause 4.1 of the settlement agreement stipulates as follows:

> The parties hereby agree to appoint the accountant, to conduct the following upon the terms and conditions as stated herein:
>
> 4.1.1. To forthwith commence the valuation exercise on the companies and Central Electric Co wherein the required consents of each and every respective company and the Central Electric Co vide their respective board of directors' resolutions and authorisation letter of the Central Electric Co have been obtained, to facilitate the full inspection of their books, financial accounts and all other relevant documents.

[6] The settlement agreement defines the words 'share sale price' as 'the consideration to be paid by Loi Tek Huat and Loi Teak Ping for the purchase of the shareholding of Loi Teak Kuong and Wong Min Ngik which amount shall be the equivalent of 28% and 16% respectively of the net value of each company as determined pursuant to this agreement'.

[7] The settlement agreement further defines the phrase 'valuation exercise' as 'a complete valuation and due diligence audit exercise to be undertaken by the accountant for the purposes of this agreement'. While the phrase 'net value' is defined in the settlement agreement as 'the net value of the companies to be determined pursuant to the valuation exercise'.

[8] And according to cl 5.3 of the settlement agreement:

> The parties hereby agree that the payment for the share sale price and the equity sale price shall be:
>
> 5.3.1. Firstly, by way of distribution of assets/property; (and)
>
> 5.3.2. The balance, if any, by way of cash.

[9] It is rather unfortunate that the valuation exercise could not be completed because the accountant was unable to complete the valuation of another partnership business which is also the subject of the settlement agreement. And this can be seen in exh 'B–5' of encl 10.

[10] The plaintiff is in financial difficulty. It is unable to repay the loan of Malayan Banking Bhd (formerly known as the Phileo Allied Bank (Malaysia) Bhd) as well as other creditors. Malayan Banking Bhd ('MBB') brooks no nonsense and through it solicitors M/s Wong Lu Peen & Tunku Alina demanded that the plaintiff pay RM366,073.65 together with interest at the rate of 1.25% per annum on base lending rate. In the letter of demand, M/s Wong Lu Peen & Tunku Alina stipulates that MBB wants the plaintiff to make payment within seven days otherwise MBB would commence legal action against the plaintiff.

[11] In fact, MBB did commence legal action against the plaintiff in the commercial court vide D3–22–1457 of 2003. Faced with this legal action, the plaintiff had no choice but to resolve to sell the property in order to repay the debt to MBB. Based on the resolution of the plaintiff, a sale and purchase agreement between the plaintiff and Chee Lye Kweem (hereinafter referred to as the 'purchaser') was entered into on 28 February 2003 wherein the property was sold for the sum of RM600,000 only. After the sale and purchase agreement for the sale of the property to the purchaser was entered, the defendant entered a private caveat on the said property on 17 March 2003 on two grounds:

(1) that he is the shareholder of the plaintiff; and

(2) that the settlement agreement conferred him rights in the property.

THE LAW IN RELATION TO THE REMOVAL OF A PRIVATE CAVEAT

[12] The classic case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, a decision of Lord Diplock speaking for the Privy Council, is an ideal starting point. In that case at p 215 of the report, Lord Diplock held that as a registered proprietor, the caveatee (in the present case it is the plaintiff) can rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases. As such, according to Lord Diplock, it is for the caveator (in the present case it is the defendant) to satisfy the court that there are sufficient grounds in fact and in law for continuing in force a private caveat.

[13] In order for the private caveat to remain on the register, it is for the defendant as the caveator to satisfy the court:

(a) that he has a caveatable interest within the meaning of s 323(1) of the National Land Code 1965 ('NLC');

(b) that his claim raises a serious question to be tried; and

(c) that, on the balance of convenience, it would be better to allow the private caveat to remain until the trial of the action.

[14] These simple propositions of the law can be garnered from the following two authorities:

(i) *Kumpulan Sua Belong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 (SC); and

(ii) *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 (CA).

[15] Under s 327(1) of the NLC, a private caveat may be removed by the court on the application of any person or body aggrieved by its existence. That sub-section reads as follows:

> Any person or body aggrieved by the existence of a private caveat may at any time apply to the court for an order for its removal, and the court (acting, if the circumstances so require, ex parte) may make such order on the application as it may think just.

[16] It is rather obvious from the provision of s 327(1) of the NLC that it is not necessary for an applicant to show that he has a registered title or interest affected by the existence of a private caveat. Lord Diplock in *Eng Mee Yong* pointed out that the procedure in s 327(1) of the NLC is available to any person aggrieved by the existence of a private caveat and this is irrespective of whether or not that person has a registered title or interest in the land.

[17] Where the applicant aggrieved by the existence of a private caveat is the caveatee (like the present plaintiff here who is also the registered proprietor of the property), according to Lord Diplock in *Eng Mee Yong* the onus lies on the caveator (like the present defendant here) to satisfy this court that on the evidence presented to it the private caveat ought to remain pending the trial of the action (*Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145 at pp 146 to 147). There is no necessity for the caveatee (like the present plaintiff here) to show that it is aggrieved by the existence of the private caveat because the present plaintiff here can rely upon its registered title as *prima facie* evidence of its unfettered right to deal with the property as it pleases. Lord Diplock in *Eng Mee Yong* used the word 'caveatee' in relation to and in reference to the registered proprietor of the land there because his Lordship was dealing with an application by the registered co-proprietors for the removal of the private caveat entered against their land by the respondent there.

A TO THE HEART OF THE MATTER

[18] The plaintiff says that the defendant is not a person with caveatable interest. The defendant says otherwise. To resolve this impasse, it is ideal to examine the following points:

B (1) the defendant as a shareholder of the plaintiff does not have a caveatable interest on the property;

(2) the settlement agreement does not confer any caveatable interest on the defendant; and

(3) the defendant's interest in the property is only monetary in nature.

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[19] I will now examine these points in quick succession.

THE FIRST POINT

D **[20]** The Supreme Court in *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189 held that a managing director either personally or as a shareholder or as an officer of the company does not have a caveatable claim to title or registrable interest under s 323(1) of the NLC. In impeccable style, Mohamed Azmi SCJ aptly said in *Hew Sook Ying v Hiw Tin Hee* at pp 198 to 199 of the report:

E > Further, once the company has executed the instrument of transfer in Form 14A in favour of the purchaser, and handed over the original document of title, the managing director either as an officer of the company or in his personal capacity as a shareholder has no fiduciary duty to challenge the conduct of the company by means of a private caveat for the alleged purpose of protecting his own interest or the interest of other shareholders.

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[21] I will now refer to Form 19B that can be seen in exh 'A–3' of encl 2. It is evident from Form 19B that the private caveat that was entered by the defendant was as a shareholder of the plaintiff for the express purpose of protecting his personal interest. In its original text, it is worded as follows:

G > Saya merupakan salah seorang pemegang saham dalam Natsafe (M) Sdn Bhd (No Syarikat 220666–U). Natsafe merupakan pemilik berdaftar kepada hartanah yang dipegang di bawah HS(D) 48466 No Lot 47973 Mukim Kuala Lumpur ('Hartanah tersebut').

[22] Now, Form 19B is the form that must be used when a person or body H applies to enter a private caveat and, for this exercise, Form 19B as filed by the defendant does not vest in him, as a shareholder, any caveatable interest in the property. In sharp contrast, the position of the purchaser stands on firmer ground. Even though the purchaser has not paid the full amount of the purchase price, the purchaser was willing, at all material times, to complete the I sale and purchase agreement by paying the full purchase price. In fact, the only reason why the purchaser has not paid the full purchase price is due to the existence of the private property. Bluntly put, the private caveat entered

by the defendant is an obstacle to the completion of the sale transaction of the property.

THE SECOND POINT

[23] The defendant claims that he has a caveatable interest in the property by virtue of the settlement agreement. I beg to disagree.

[24] It is trite law that the plaintiff, a limited company incorporated under the Companies Act 1965, and its shareholders are two separate legal entities (*Hew Sook Ying v Hiw Tin Hee*). To reiterate, the property is registered in the name of the plaintiff and not the shareholders of the plaintiff. It must be recalled to mind that the Supreme Court in *Hew Sook Ying v Hiw Tin Hee* emphasised, in clear words, that in a case where the company was the registered proprietor of the land and had sold the land to the appellant and had handed to the appellant the instrument of transfer and the document of title for registration, it was impossible to envisage how the respondent there as the managing director either personally or as a shareholder or as an officer of the company, could be said to have a caveatable claim to title or registrable interest under s323(1) of the NLC. Likewise here, as a shareholder of the plaintiff, the defendant has no caveatable interest, at all, in the property. Even the settlement agreement does not confer any caveatable interest in the defendant. The plaintiff is not a party to the settlement agreement. The parties involved in the settlement agreement are the shareholders of the plaintiff. That being the case, the defendant cannot enforce the settlement agreement against the plaintiff. It is for this very reason that the settlement agreement does not confer any caveatable interest to the defendant.

[25] Lest I be accused of an oversight, I must say that cl 5.3 of the settlement agreement, as reproduced earlier, makes reference to the property. In essence, it stipulates that between the shareholders of the plaintiff that Loi Tek Huat and Loi Teak Ping are to purchase the shares of the defendant and Wong Min Ngik in the plaintiff. The purchase price is to be settled, firstly, by way of distribution of the plaintiffs assets and, secondly, by way of cash.

[26] I agree with the plaintiff's submission that the provision concerning the distribution of the plaintiffs property to satisfy the purchase price of its own shares (hereinafter referred to as 'distribution') is unenforceable in law for the following reasons:

(a) the distribution in question has the effect of reducing the share capital without leave of the court and hence it is unenforceable by virtue of s 64 of the Companies Act 1965; and

(b) the distribution has the effect of assisting the plaintiff's shareholders to purchase the plaintiffs own shares and hence it is unenforceable.

[27] In *NP Sinnasamy v Hup Aik Omnibus Co* [1952] MLJ 36, the Court of Appeal with a coram of Pretheroe Ag CJ, Thomson and Briggs JJ held that the court cannot order the refund of the money for the value of the shares because such an exercise would involve an illegal reduction of capital.

[28] In *Merchant Credit Pte Ltd v Industrial & Commercial Realty Co Ltd* [1983] 1 MLJ 124, Lord Templeman delivering the judgment of the Privy Council held that a company cannot be ordered to pay back the purchase price paid by its investor because such payment would amount to an illegal reduction of the company's capital.

[29] In *Trevor & Anor v Whitworth & Ors* [1886–90] All ER 46, the House of Lords held that a company formed and registered under the Companies Acts has no power to purchase its own shares even though authority to do so was conferred by its memorandum or articles of association.

[30] Now, in the present case, the distribution has the effect of illegally reducing the capital because if the distribution is permitted, the plaintiff will have to use its own assets to pay to the defendant for the defendant's shares in the plaintiff. In addition to that, the distribution if executed is effectively providing financial assistance to its shareholders, namely, Loi Tek Huat and Loi Teak Ping to purchase its own shares. This is frowned upon by s 67(1) of the Companies Act 1965 which enacts as follows:

> Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase deal in or lend money on its own shares.

[31] In *Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors* [1981] 2 MLJ 114, both the minority shareholders and the majority shareholders entered into an agreement to the effect that the company would purchase the shares of the minority shareholders and that the company would raise the purchase price by a mortgage of its own property. In respect of this agreement, the Federal Court had this to say (see the judgment of that brilliant judge In the person of Abdoolcader J) at p 115 of the report:

> In any event the second to sixth prayers in the appellants' summons which later were sought to be substituted by a prayer for the approval of the scheme of arrangement entered into by the agreement of 28 September 1979 between the majority and minority shareholders clearly fly in the face of the prohibition enacted in s 67 of the Act as the net effect of both the original prayers and the arrangement entered into would be the purchase by the company of the second, third and fourth respondents' shares. Section 67 clearly prohibits except as is otherwise expressly provided by the Act the purchase by a company of its own shares or any direct or indirect financial assistance by it for the purchase of its

shares. The exceptions provided for in s 67(2) do not apply. The rule laid down by the House of Lords in *Trevor v Whitworth* (1887) 12 App Cas 409 that a company has no power to purchase its own shares remains inviolate, and very recently in *Armour Hick Northern Ltd & Ors v Whitehouse & Ors* [1980] 3 All ER 833; 1 WLR 1520 it was held that on the true construction of the English counterpart of s 67 of the Act the prohibition against the provision of financial assistance for the purchase of shares was not confined to assistance given to a purchaser but extended to assistance given to the vendor of the shares. There is also a prayer for an order for reduction of capital without going through the essential requirements laid down in s 64 of the Act for a special resolution and the other requisite preliminaries stipulated therein before the court can make an order confirming the reduction.

[32] In *Independent Steels Pty Ltd v Ryan & Anor* [1990] VR 247, the facts may be stated as follows. Ryan and Dickason were the shareholders in Malron. They both agreed to sell their shares in Malron to Metals. In return, a subsidiary of Malron would pay consultants' fees to Ryan and Dickason. The Supreme Court of Victoria held that such an agreement was unenforceable because the consultants' fees were part of the consideration of the purchase of Malron's shares by Metals. Such transaction was therefore held to be prohibited by s67(1) of the Companies Act 1961 (which is in pari materia to our s 67(1) of the Companies Act 1965), The Supreme Court of Victoria also held that even if the purpose of the financial assistance by the company was to partly facilitate the purchase of the shares, the said section was said to have been infringed. As I said, in the present case, there was an agreement to purchase the defendant's shares in the plaintiff by the purchasers. The consideration for the purchase price is the property of the plaintiff. The manner of distribution is in the form of a financial assistance given to Loi Tek Huat and Loi Teak Ping to purchase the shares of Wong Min Ngik and the defendant in the plaintiff and this is clearly prohibited by s 67(1) of the Companies Act 1965.

THE THIRD POINT

[33] The defendant's purpose in entering the private caveat is to protect his interest as a shareholder as well as his interest in the settlement agreement. The defendant argues that because the property forms part and parcel of the subject matter of the settlement agreement, his interest in the settlement agreement would be affected by the sale of the property. The crux of the settlement agreement is this. That it is for Loi Tek Huat and Loi Teak Ping to purchase the shares of the defendant and Wong Min Ngik in the plaintiff. The crucial parts of the settlement agreement can be seen in the following clauses:

(1) Clause 5.3 of the settlement agreement sets out the alternative mode of payment of the purchase price; and

(2) Clause 5.5.1 stipulates that if the parties are unable to agree on the determination of the identity or the allocation of the property, the property shall be sold and the proceeds shall be distributed accordingly.

[34] It is quite apparent that the 'interest' acquired by the defendant is not in the property but rather the proceeds of sale of his shares in the plaintiff. From the clauses in the settlement agreement as reproduced earlier what is also apparent is this. That the property is only one of the various modes of payment of the 'share sale price'. It was even agreed that in the event the parties cannot determine the identity of the property, the property shall be sold and the proceeds therefrom will be distributed accordingly. Clearly therefore the defendant 'acquires' no proprietary interest whatsoever in any property of the plaintiff. And so it can be surmised that the defendant's right arising from the settlement agreement is merely 'monetary' and it arises from the value of his shares in the plaintiff. For these varied reasons, it cannot be said that the defendant has a caveatable interest as he is neither claiming any right or interest to such title of the property. In *Kundang Lakes Country Club Bhd v Garden Masters (M) Sdn Bhd* [1999] 2 MLJ 537, the Court of Appeal held that a mere debt cannot give rise to a caveatable interest. The Court of Appeal also referred to its own decision in *Trans-Summit Sdn Bhd v Chun Nyook Lin (P)* [1996] 2 MLJ 247 where it rejected a joint-venture party's contention that they have a caveatable interest in the subject land of the joint venture project. In *Balakong Development Sdn Bhd v Loo Kok Yuen & Anor* [1999] 2 MLJ 646, the High Court held that an agreement to sell shares does not confer any caveatable interest to the purchaser.

[35] In the context of the present case, the defendant's interest, if any, is so uncertain, vague and unidentifiable for the following reasons:

(1) there is no property identified in the settlement agreement and the defendant cannot claim an interest on all the assets of the plaintiff merely because the settlement agreement exists; and

(2) it could be the case where the defendant's shares have only a nominal value after the valuation by the accountant.

[36] It must be emphasised that the 'interest' of the defendant, if any, is only focussed on part of the property. It must be borne in mind that the defendant holds 70,000 units of shares in the plaintiff (see exh 'A–1' of encl 2). And that currently, the total assets as disclosed in the balance sheets are below the total liability. The plaintiffs unappropriated loss had exceeded the paid up capital. Hence the total value of the defendant's shares cannot exceed the value of the property bearing in mind that the property was sold to the purchaser at RM600,000. At the most, the defendant could only claim part of the property but he certainly has no right to enter a private caveat on the entire property.

[37] For all these reasons, it would be correct to say that the defendant has no caveatable interest.

[38] Two other issues will now be examined briefly. They may be stated as follows:

THE DAMNING CONDUCT OF THE DEFENDANT

[39] Even assuming for the moment that the defendant has a caveatable interest in the property, which is not the case here, the conduct of the defendant in not filing any action to enforce his purported right to the property leaves much to be desired. It must be recalled that the private caveat was entered by the defendant on 17 March 2003. To date, sad to say, the defendant has not commenced any action to enforce his purported right to the property. There has been a delay of almost two years on the part of the defendant to commence proceedings timeously to enforce his legal rights, if any. There is no indication whatsoever that an action will be filed in respect of the property. In any event and at any rate, the defendant has no cause of action whatsoever against the plaintiff and/or its property. The private caveat on the property ought to be removed forthwith.

BALANCE OF CONVENIENCE

[40] The balance of convenience would certainly lie in favour of removing the private caveat. The following arguments must surely be put in the forefront in adjudicating encl 1:

(a) The plaintiff is saddled with a heavy financial problem and to overcome it, the plaintiff has sold the property to the purchaser in the sum of RM600,000 in order to repay the loan to MSB. But the transfer of the property to the purchaser cannot be effected since there is a private caveat lodged by the defendant.

(b) If the private caveat remains on the register, the sale and purchase agreement between the plaintiff and the purchaser cannot be completed because the property cannot be transferred to the purchaser. In such a situation, the purchaser has the right to terminate the sale and purchase agreement and seek the refund of the purchase price. It is said that if this were to happen it would lead to a disastrous consequence because the plaintiff is in a financial difficulty (see the averments in para 12 of encl 10).

(c) In the event the sale and purchase agreement is terminated, the plaintiff may be wound up as it has no means of repaying the deposit to the purchaser.

(d) In sharp contrast, the defendant is only protecting his contractual interest in respect of the purchase price of his shares in the plaintiff. Such right is enforceable against the parties to the settlement agreement and not against the plaintiff. The mere fact that the property is sold does not affect the defendant's interest because his right is confined to the claim of the purchase

price of his shares from Loi Tek Huat and Loi Teak Ping. According to the settlement agreement the balance of the share price will be paid in cash.

[41] I will now proceed to examine some of the issues raised by the defendant out of deference to him.

NON-AVERMENTS IN THE AFFIDAVITS

[42] The defendant raised the following factual matrix:

(1) in regard to the relationship of the shareholders in the plaintiff;

(2) in regard to the background facts leading to the filing of the petition in the commercial court vide D1–28–379 of 1999 and the filing of the civil suit in the civil court vide S7–22–900 of 2000;

(3) in regard to the intent and purpose of the settlement agreement; and

(4) in regard to the issue that the plaintiff and its shareholders are not separate legal entity.

[43] But, unfortunately, these facts and issues were not averred in the defendant's affidavits. In *Bee Ya Hock @ Beh Ah Hock v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1994] MLJU 85, I have this to say:

> I have said elsewhere that in a contest of affidavits, the parties must put their thoughts on paper and not to hide them. Affidavits, properly drafted would be able to identify the issues. In this way, no party would be caught by surprise. Clearly, therefore the points raised by Mr Manjit Singh were not deposed in the affidavits of the plaintiffs and the defendants cannot be held accountable to the plaintiffs (*Ng Chai Tang v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* Originating Summons No 24–6 of 1994 (T) (unreported)). The system of affidavits has not been designed to be weighted in favour of one party but to ensure, as has been said time and again, that there is fair play between the parties and that each party knows what issues he has to meet on the affidavits in advance.

[44] These facts and issues raised by the defendant were raised from the bar and they should not be considered by this court (*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281).

[45] The defendant pointed out that the plaintiff and its shareholders are not separate legal entity. Again this was not raised in the defendant's affidavit. Neither was there any averment of facts in the defendant's affidavit that supports his contention. All these should be disregarded by this court.

[46] It must be emphasised that it is the defendant's onus to show to this court that the private caveat he entered must remain on the register (*Eng Mee Yong*). It is the defendant's duty to present evidence to show that the plaintiff

and its shareholders are not separate legal entity. This has not been done by the defendant. There is no evidence to show that all the shareholders are related to one another and that the plaintiff is a 'mere vehicle or alter ego to resolve disputes and to reach settlement among the family members'.

[47] It is elementary that 'an incorporated association has a legal personality of its own apart from the persons who comprise it' (per NH Chan JCA in *Lee Eng Eow v Mary Lee & Ors* [1999] MLJU 301, CA). Walter Woon in his book entitled *Company Law* (2nd Ed) at p 52 stated the law in this way and I gratefully adopt them:

> Incorporation of a company casts a veil over the true controllers of the company, a veil through which the law will not usually penetrate. However, in certain situations a court will ignore the separate legal personality of a company and look to the members or the controllers of the company. This is colourfully referred to as 'lifting the veil'. The situations in which the veil may be lifted are exceptional. Ingeneral, the courts will respect the company's modesty and decline to lift the veil.
>
> The only justification for lifting the veil of incorporation is that the company is in fact not a separate entity. This requires evidence. If the evidence does not establish that the company is run as a mere extension of its controllers' affairs, the veil of incorporation should remain firmly in place. However, if it can be proven that the company is in fact not a separate entity from its controllers, a court might be persuaded to lift the veil in the appropriate circumstances.

[48] So I say, with a certain measure of certainty, that the courts are generally slow to lift the corporate veil. It can only be done when there is evidence. The doctrine of independent legal entity should be the rule and that instances of piercing the corporate veil should remain the exceptions to the rule.

[49] The onus on the part of the defendant, in this case, is certainly light. The defendant has to satisfy this court that there is a 'serious question to be tried'. Unfortunately, there is no iota of evidence to demonstrate that there is an issue to be tried. There is no evidence to show that this case falls under any of the established category which permits this court to lift the corporate veil. It has not been shown that the plaintiffs shareholders have abused the plaintiffs function as an incorporated company. The test as laid down in *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff Shah Mohd & Ors & other appeals* [1996] 2 MLJ 265 (CA) that the 'justice of the case so demand' has not been fulfilled. Furthermore, if the parties to the settlement agreement intended to bind the plaintiff they should make the plaintiff a party to the settlement agreement. There is no difficulty to do so if it is true that the plaintiff is a mere 'alter ego'. Since there is no explanation as to why the plaintiff was not made a party to the settlement agreement, the only conclusion is that the plaintiff cannot be bound by the settlement agreement.

THE UNCOOPERATIVE ATTITUDE OF LOI TEK HUAT IN THE PREPARATION OF THE FINAL ACCOUNT

[50] It is the allegation of the defendant that the account of the plaintiff cannot be finalised because of the uncooperative attitude of Loi Tek Huat. This is a mere bald assertion. It is not true. In fact, the valuation report of the plaintiff has been done and it is completed (see the averments at para 14 of encl 10 and exhs 'B–4' and 'B–5' of encl 10). The accountant refuses to produce the account of the plaintiff because the account of another partnership business Central Electric Co has not been finalised. This is further supported by another letter dated 5 August 2003 as seen in exh 'C–3' annexed to encl 12. In fact, the last letter from WWF Consultants Sdn Bhd dated 4 December 2002 as seen at exh 'LTK–2' of encl 11 merely mentioned about the accounting records of Central Electric Co and nothing was mentioned about the records of the plaintiff. In para 6 of encl 12, Loi Tek Huat averred that all the documents required in para 2 of WWF Consultants Sdn Bhd's letter dated 15 November 2002 were given. But there is no reply from the defendant. So, on the authority of Ng Hee Thoong the defendant is deemed admitting the averment. At the very least, this issue has been credibly denied by the plaintiff. Thus far, the defendant has failed to produce sufficient evidence to contradict the averments of the plaintiff. Gopal Sri Ram JCA delivering the judgment of the Court of Appeal in Syarikat Telekom Malaysia v Business Chinese Directory Sdn Bhd (1997) 1 CLJ 596 cited with approval the decision of Lord Templeman in *Tay Bok Choon v Tahansan Sdn Bhd* [1996] 3 MLJ 692 especially to the passage in the judgment of Lord Templeman at p 436 which states as follows:

> At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

[51] In any event, the uncooperativeness of Loi Tek Huat cannot constitute a 'caveatable interest' in the said property. Even assuming that the allegation of the defendant is true, it only constitutes a cause of action for the defendant to sue the defaulting party for the breach of contract.

THERE IS AN IMPLIED TERM THAT THE PROPERTY OF THE PLAINTIFF MUST NOT BE TRANSACTED PENDING FINALISATION OF ITS ACCOUNT

[52] I have earlier held that the plaintiff is a separate legal entity from its shareholders and that makes this issue irrelevant for the purpose of adjudicating encl 1. It must also be emphasised that the plaintiff is not a party to the settlement agreement. There is no privity of contract. In simple language the doctrine of privity of contract may be stated in this manner: only an original party to a contract may sue or be sued upon it. In other words, only

an original party may enforce or be bound by the terms of the contract (*Tweddle v Atkinson* (1861) 1 B&S 393).

[53] Be that as it may, for the sake of argument, I will now deal with the issue on implied term. I must first refer to the case of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151, a decision of the Federal Court. There the Federal Court laid down two tests, both of which must be satisfied, before the court can infer the intention of having an implied term, namely:

(1) the officious bystander test; and

(2) the business efficacy test.

[54] Here, there is no implied term that the property of the plaintiff must not be transacted pending completion of the valuation exercise. When a bystander suggests to incorporate the implied term, the plaintiff would not respond with the phrase, 'Oh, of course'. This is simply because such an undertaking would render the plaintiff unable to realise any of its assets in order to satisfy its liability. It would open the door for the plaintiffs creditors to file a claim in court against the plaintiff or they may petition to wind up the plaintiff. In any event, the distribution of the plaintiffs property is merely one of the ways for the plaintiff to satisfy the purchase price of the shares of the defendant.

[55] For the same reasons, the 'business efficacy' test cannot be fulfilled. Itis certainly not 'business efficacy' for the plaintiff to agree to the implied term which will only subject the plaintiff to liability of being sued and be wound up.

[56] If the implied term would compromise the financial position of the plaintiff, then it cannot be argued that the plaintiff intended to agree to the implied term.

THE SETTLEMENT AGREEMENT DATED 13 DECEMBER 2001 WHICH WAS AGREED IN THE FORMAT OF THE *Tomlin* order should not be reviewed

[57] The defendant's counsel raises this issue by way of a response to the issue of the unenforceability of cl 5.3.1 of the settlement agreement. It is the plaintiffs stand, and I agree, that cl 5.3.1 of the settlement agreement is unenforceable for the following reasons:

(a) being an illegal reduction of capital; and

(b) it contravenes s 67(1) of the Companies Act 1965 in that it assists the plaintiffs shareholders to purchase its own shares.

[58] In regard to the issue of illegality, the defendant's counsel relied heavily on two authorities, namely:

(a) *Priyamas Export Corp Sdn Bhd v Bank Buruh (Malaysia) Bhd* [1998] 3 MLJ 273 (CA); and

(b) *Andamy Plantations Sdn Bhd v Tunis Saladou & Ors* [2002] 6 CLJ 201, a decision of the High Court,

and contended that this court should not look behind the settlement agreement because it was entered based on the consent of the parties. But it must not be forgotten that the plaintiff is not a party to the settlement agreement.

[59] It is wrong to say that the settlement agreement cannot be reviewed in any circumstances whatsoever even when it comprises of an undertaking that is both illegal and unenforceable.

[60] In *Priyamas*'s case, the same issue of illegality was raised in the earlier proceedings in the High Court. Later, the parties entered into the consent order to resolve the dispute, *inter alia*, on the issue of illegality amicably and conclusively. It was on this basis that the Court of Appeal dismissed the appeal because the parties had resolved the issue of illegality by the consent judgment which was being attacked in the later proceeding. The decision of the Court of Appeal was founded on the issue of estoppel but it was not clearly spelt out. Whereas in the present case before me, the issue of illegality of cl 5.3.1. of the settlement agreement was not an issue in suit S1–22–900 of 2000. It was incorporated in the settlement agreement as a mode of payment of the purchase price. It only affects one of the various 'execution' of the promise contained in the settlement agreement. The main consideration of the sale and purchase of the defendant's shares is not affected. Furthermore, the Court of Appeal in *Priyamas* did consider the issue of illegality and held that it was without merits. Of course, the Court of Appeal would come to a different decision if the learned judges of the Court of Appeal concluded that the consent order therein was illegal. I am of the considered view, with respect, that *Priyamas* does not support the argument that once the parties enter into a consent judgment, the illegality of its terms cannot be questioned.

[61] I will now proceed to examine *Andamy*'s case. There the plaintiff sought to set aside the consent order entered earlier because the plaintiff in that case contended, inter alia, that they made a mistake of law in relation to the native customary rights. The learned High Court judge refused to grant the relief sought by the plaintiff because the same issue of native customary rights were raised in the proceedings before the entry of the consent judgment. So the basis of the High Court judge's decision was that the parties were well aware of the issue in dispute, namely, the native customary rights. When the consent judgment was recorded, it was intended to record what was agreed by the parties to settle the dispute. Hence, 'the issue of who is right or wrong in law does not come into the picture when an amicable settlement is reached'.

[62] Both *Priyamas* and *Andamy* concerned re-opening of an issue which the parties had settled and the courts there refused to do so. Furthermore, the issue of 'mistake of law' is entirely different from the issue of 'illegality'. A mistake affects the voluntariness of entering into a contract -it involves the state of mind of the contracting parties. Whereas 'illegality' goes to the enforceability of the contract — it concerns the issue of public policy. Unlike *Priyamas* and

Andamy, cl 5.3.1 of the settlement agreement was not the issue in the earlier proceedings. It is one of the ways to pay the purchase price. But unfortunately, this mode is unenforceable due to illegality.

[63] I need to refer to two authorities which decided unequivocally that a judgment, be it by way of a consent or otherwise and which contravenes any written law, is unenforceable. The first would be *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, a decision of the Federal Court. There the Federal Court held that an order given in contravention of substantive statutory prohibition may be set aside. The second would be the case of *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761, also another decision of the Federal Court, and Pen Swee Chin FCJ delivering the judgment of the Federal Court aptly said at p 783 of the report:

> A consent order is an order of the court carrying out an agreement between the parties. It used to be thought at one time that only a ground of fraud could cause a consent order to be set aside. It is now well settled that a consent order can be set aside on the same grounds as those on which an agreement may be set aside, see eg again *Huddersfield Banking Co v Lister* (1895) Ch 278.

[64] At this juncture, it would be ideal to refer to s 24 of the Contracts Act 1950 which enacts (the relevant parts) that, 'The consideration or object of an agreement is lawful, unless:

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law.

[65] And Gibbs ACJ writing a separate judgment in *Yango Pastoral Company Pty Ltd & Ors v First Chicago Australia Ltd & Ors* (1978) 139 CLR 410, at p 413 aptly said:

> There are four main ways in which the enforceability of a contract may be affected by a statutory provision which renders particular conduct unlawful: (1) The contract may be to do something which the statute forbids; (2) The contract may be one which the statute expressly or impliedly prohibits; (3) The contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful; or (4) The contract, although lawful according to its own terms, may be performed in a manner which the statute prohibits.

[66] Now, if cl 5.3.1 of the settlement agreement is performed, it amounts to an illegal reduction of capital and at the same time assisting the plaintiffs shareholders to purchase its own shares. These are indeed the first two types of illegality described in *Yango*'s case, namely, 'to do something which the statute forbids' and 'one which the statute expressly or impliedly prohibits'.

OBSERVATION

[67] I have taken an arduous route. Most of the issues raised by the parties have been dealt with in this judgment. There were other inconsequential issues

that have not been dealt with but they are insignificant and of no consequence, at all, in adjudicating encl 1. These inconsequential issues cannot give rise to caveatable interests in favour of the defendant. On the contrary, they were raised to derail and delay the adjudication of encl 1.

CONCLUSION

[68] It is my judgment that the defendant does not have a caveatable interest within the meaning of s 323(1) of the NLC. The grounds stated in Form 19B are untenable and cannot form a serious question to be tried. The settlement agreement cannot be enforced against the plaintiff. It is, in my judgment, unenforceable in law and confers no proprietary interest. It must be emphasised that the defendant had delayed in taking legal action to enforce his purported right. Even assuming for a moment that the defendant has a caveatable interest on the property, which is not the case here, the balance of convenience lies in favour of the removal of the private caveat.

[69] For all these reasons, I must give an order in terms of encl 1 especially for prayers (a), (b), (c) and (d). I do so accordingly.

Application allowed.

Reported by Izzaty Izzuddin